Petition

81-261

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ALEXANDER L. STEVAS,
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No._____

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1980

LAWRENCE R. MEACHUM, ET AL.
Petitioner

v.

NORMAN L. LONGVAL,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

STEPHEN R. DELINSKY
Chief, Criminal Bureau

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division
One Ashburton Place
Boston, MA 02108
727-2240

QUESTIONS PRESENTED.

I. Whether the Fourteenth Amendment is violated by a state court trial judge's suggestion to defense counsel, after hearing certain of the prosecution's evidence which he characterized as very serious, that he ask his client to consider a plea because if the jury returned a verdict of guilty, the court might be disposed to impose a substantial prison sentence?

II. Whether the rule and rationale of North Carolina v. Pearce, 395 U.S. 71 (1969) is applicable to plea bargaining situations?

III. Whether a defendant's subjective perception of possible vindictiveness is the proper standard by which to determine a Due Process violation in a habeas corpus proceeding?

PARTIES.

Lawrence R. Meachum and Fred Butterworth were named as respondents below. Norman L. Longval was the petitioner in the Court below.

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IN THE SUPREME COURT
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PETITION FOR WRIT OF CERTIORARI
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THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

The petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the First Circuit.

OPINIONS BELOW.

The opinion of the Court below, Longval v. Meachum, No. 80-1503 (App. A), is not yet reported. The opinion of the Massachusetts Supreme Judicial Court Commonwealth v. Longval, is reported at 390 N.E.2d 1117 (1979) (App. B).

JURISDICTION.

The decision of the Court below was rendered on June 19, 1981. The mandate was stayed until August 10, 1981, pending the application to this Court for a Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOKED.

Fourteenth Amendment.

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law... .

STATEMENT OF THE CASE.

On September 8, 1975, Norman Longval and two others were indicted for armed robbery, assault by means of a dangerous weapon, unlawfully carrying a sawed off shotgun, and using a motor vehicle without authority.

Prior to trial, one co-defendant (Ellard) pled guilty and was sentenced as follows: two years at a House of Correction for assault by means of a dangerous weapon, one year in a House of Correction for using a motor vehicle without authority to be served from and after the first sentence and three years probation one one armed robbery charge to run from and after the second sentence. The remaining indictments were filed.

Longval and the remaining co-defendant were tried before a jury. The co-defendant was acquitted. Longval was convicted on all indictments and was sentenced as follows: concurrent terms of thirty-two to forty years at Massachusetts Correctional Institution, Walpole on the armed robbery charges; concurrent terms of eight to ten years on the assault and gun carrying

charges to run from and after the sentences for armed robbery. The motor vehicle charge was filed.

Longval appealed his sentence to the Appellate Division of the Superior Court. His sentences were reduced as follows: concurrent terms of thirty to forty years on the armed robbery charges and lesser terms as to the other sentences, all to be served concurrently with the armed robbery sentence.

On his appeal pursuant to G.L. c. 278, §§33A-G, Longval assigned one error dealing with the disparity between his sentences and those given Ellard.

Subsequently Longval filed a petition for a writ of error in the Supreme Judicial Court attacking his sentences and referring to matters outside the record on appeal. A Single Justice of the Court ordered that

the record on appeal be expanded to include the transcript of co-defendant Ellard's plea and sentencing and to include a report of a Special Master of the substance of an unrecorded lobby conference between the sentencing judge and counsel. After hearing, the Special Master had found that in the unrecorded conference during the presentation of the Commonwealth's case, the trial judge said to Longval's counsel:

> "[T]he evidence in this case as it is coming in is very serious -- robbery of a drug store, taking (i.e. theft of) drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea (of guilty). I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial."

Report of Special Master and Commissioner, 3-4 (App. C).

Subsequently the Supreme Judicial Court affirmed the judgments of conviction. Commonwealth v. Longval, 390 N.E.2d 1117 (1979).

Thereafter Longval filed, pro se, a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts alleging that his state conviction and sentence were obtained in violation of the Sixth and Fourteenth Amendments of the United States Constitution. Counsel was appointed and, on May 7, 1980, after a prior hearing, the petition was dismissed. On May 20, 1980, the district court refused to certify that there was probable cause to prosecute an

appeal.[1/]

On June 19, 1981, the Court of Appeals reversed the district court and ordered

> "The writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice, other than the one who presided at his trial."

Longval v. Meachum, No. 80-1503 (App. A).

The mandate of the court was stayed until August 10, 1981 pending the instant filing of a petition for writ of certiorari.

1/In denying the application the Court noted the following:

> "I refuse to certify that there is probable cause to prosecute their appeal. At argument counsel for the plaintiff asserted that the basis for his claim was that a pretrial statement of the trial judge "chilled his right" to a jury trial. The petitioner however elected to proceed by jury trial and was found guilty by a jury. In my opinion this application and their present appeal are frivolous."

REASONS FOR GRANTING REVIEW.

Introduction.

The Court of Appeals in what may have been an appropriate decision pursuant to the Court's supervisory powers over the lower district court, has in a habeas corpus proceeding ordered the Commonwealth to resentence a state prisoner or a writ of habeas corpus will issue. The basis for the court's decision is that a state court trial judge's comments to defense counsel regarding the advisability of a plea and reference to the possibility of a substantial sentence if the jury returned a guilty verdict raised an appearance of vindictiveness and "could reasonably have had a chilling effect on the exercise of the defendant's right to trial by jury." The Court further held that since the trial

judge's participation in plea bargaining raises the "possible appearance of vindictiveness" the case need be remanded for resentencing by a judge other than the one who presided at trial.

Review should be granted for the following reasons which will be elaborated in the Argument section of the petition.

1. The decision of the federal court of appeals in its rejection of the state courts findings concerning the appropriateness of the trial court's remarks is in direct conflict with this Court's decision in Sumner v. Mata, ___ U.S. ___, 101 S. Ct. 764 (1980).

2. The decision of the Court below in applying North Carolina v. Pearce, 395 U.S. 71 (1969) is in conflict with this Court's decision in Bordenkircher v. Hayes, 434 U.S. 357 (1978).

3. The decision of the Court below with reference to a state court trial judge's suggestion of a possible plea negotiation is in conflict with decisions of other federal courts of appeal and state courts concerning the permissable degree of participation by a trial judge in plea negotiations.

4. The standard applied by the Court below for determining vindictiveness is in conflict with the standard applied by other federal courts of appeal.

ARGUMENT

I. THE COURT BELOW HAS IMPROPERLY AND IN CONFLICT WITH DECISIONS OF THIS COURT EXTENDED THE RULE OF NORTH CAROLINA V. PEARCE, 395 U.S. 71 (1969).

At the outset three important factors should be kept in mind in analyzing the decision below.

First, the defendant did not offer to plead guilty and therefore there is no record to support a finding that the judge's remarks had a coercive effect.

Second, The defendant exercised his right to a jury trial. Therefore, there is no basis in the record for a finding that defendant's right to a jury trial was "chilled."

The decision below turns upon the Court of Appeal's application of North Carolina v. Pearce, 395 U.S. 71 (1969). Pearce and Blackledge v. Perry, 417 U.S. 21 (1974) address due process concerns surrounding an increase in sentence upon appeal, or an "upping the ante" by the prosecutor thus implicating double jeopardy interests. Here, however, the ante was not "upped", sentence was imposed in the original

proceeding and within statutory limits. Moreover, to the extent that such a sentence is subject to direct appellate review, the Supreme Judicial Court found an adequate, objective basis for imposition of the sentence. The Court stated:

> We add that, even were we to reach the merits of this case, and consider what is urged here to be wide disparity of punishment between coparticipants we can see ample justification for the sentences imposed. In addition to the nature of the offense, a wide variety of factors can be taken into account, such as the defendant's character, backgroud and prior record. Commonwealth v. Celeste, 358 Mass. 307, 310 264 N.E.2d 683 (1970). Letters v. Commonwealth, 346 Mass. 403, 405, 193 N.E.2d 578 (1963). While the defendant concedes that he apparently conceived and led the robbery, and carried the more dangerous weapon inside the pharmacy, he argues that there was similarity between the two men in age, background, and participation in the robbery.

> The Superior Court Judge, and subsequently the Appellate Division, were justified in concluding that widely disparate sentences, as between Ellard and the defendant, were warranted by their widely disparate criminal records. By consent of the parties, we have examined the prior records of both men. Ellard's record may fairly be said to include a number of prior offenses, but all of minor or trivial nature, with none involving violence or the likelihood of violence until he was involved in the instant armed robbery. The defendant, on the other hand, has a record of almost twenty years of repeated, serious offenses, most involving stealing in some form, and some involving breaking and entering. He has served prison terms on a number of occasions perhaps of overriding importance is the fact that the defendant served a prior five- to eight-year sentence for armed robbery. In all, the judge could conclude, and obviously did, that the defendant was a confirmed and dangerous offender. (footnote omitted).

Longval at 1121.

A. North Carolina v. Pearce Is Not Applicable.

In Pearce, this Court forebade, following a successful appeal and reconviction, the imposition of a greater punishment than was imposed after the first trial, absent specified findings justifying the increased sentence. On the premise that a more severe punishment, if imposed as purposeful punishment for a successful appeal would violate due process, the Court imposed a prophylactic rule to ensure "that vindictiveness against a defendant for having successfully attacked his first conviction ... "[would] play no part in the sentence he receives after a new trial...". Pearce, at 725.

In Colten v. Kentucky, 407 U.S. 104 (1972) this Court refused to extend the rule of Pearce to the Kentucky two-tier or

de novo trial system. The Court recognized that on a trial de novo a superior court may often impose a more severe punishment than the inferior court, but noted that it did not follow that such a sentence was a vindictive penalty for seeking a trial de novo. Colten, at 117.

Most significantly, this Court has refused to apply the Pearce doctrine to cases involving plea bargaining. In Bordenkircher v. Hayes, 434 U.S. 357 (1978), the Court held that the rationale and holding of Pearce was inapposite to the plea bargaining process. In Bordenkircher, the defendant refused to plead guilty to a felony charge carrying a potential sentence of two to ten years in exchange for a prosecutorial recommendation of five years. The prosecutor then threatened to further indict the defendant under a

recidivist statute carrying a mandatory life imprisonment sentence. The defendant refused. He was tried and found guilty on both charges and sentenced to life imprisonment under the recidivist statute. This sentence was attacked as being in violation of Pearce and Blackledge v. Perry, 471 U.S. 21 (1974). This Court rejected the argument.

> "The Court has emphasized that the due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right ... but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. ... But in the 'give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer. ... Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of

> the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial" (citations omitted).

Bordenkircher v. Hayes, supra at 363.

Here, the trial judge, in substance, merely indicated to defense counsel that he considered the evidence he had heard to be serious and based on that evidence, he might be disposed to impose a substantial sentence and that he had done so before. The special master found:

> "Nothing in the context of the conference as described to me in testimony led me to construe the judge's remarks as in any sense a threat, but merely as a statement to a young lawyer of the judge's then general impression of the evidence as it had developed to that point. Report of Special Master and Commission at 4, (App. C).

The Supreme Judicial Court in construing the remarks found:

> "We no not read the words of the judge quoted supra as supporting an inference of such punishment or threat of punishment. His words directed the attention of defense counsel to sentences he had imposed in other unrelated cases; they commented on the serious nature of the offense as shown in the evidence at trial; and they advised the defendant, through his counsel, not to forego any advantage that might accrue to the defendant by means of plea bargaining and a resulting recommendation to the Court by the prosecutor, as to the sentence.
>
> There was nothing inappropriate in these comments by the judge. Commonwealth v. Longval, 390 N.E.2d 1117, 1120 (1979)

The Court of Appeals, in apparent disregard of Sumner v. Mata, ____ U.S. ____, 101 S. Ct. 764 (1980), substituted for the state court finding their "belief" that "the words of the judge could well have been understood by defense counsel as a

'plea or else' admonition" Longval v. Meachum, (App. A). Not only is such speculation totally inappropriate in the context of review for fundamental error in a habeas corpus proceeding (See Buchalter v. New York, 319 U.S. 427, 431 (1943), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942)), it effectively and necessarily implies that as a matter of federal constitutional law a state court trial judge may not make any statements with regard to plea bargaining. This Court has never so held and the position of the First Circuit conflicts with other circuits. See, United States ex rel. Elias v. McKendrick, 439 F.2d (10th Cir. 1971), Brown v. Peyton, 435 F.2d 1352 (4th Cir. 1970), cert. denied 406 U.S. 1352 (1972); United States ex rel. Robinson v. Housewright, 525 F.2d 988 (7th Cir. 1975),

and with decisions of the state appellate courts as to the permissible degree of judicial participation in plea bargaining, Anderson v. State, 335 N.E.2d. 225 (Ind. 1975); Nichols v. State, 354 N.E.2d 474 (Ill. 1976).

In Housewright, although the issue was presented in terms of an allegedly involuntary guilty plea resulting from a state trial judges participation in a plea negotiation, the court properly noted that the federal court has no supervisory power over the state court and stated:

> "Unless the Fourteenth Amendment prohibits judicial participation in plea negotiations, this court should not interfere with state efforts to incorporate properly administered 'plea bargaining' as one component, arguably an essential one in its administration of criminal justice. Housewright at 991.

Moreover, the First Circuit's extension of Pearce in this context is inappropriate

in that it disregards this Court's practical recognition of the fact that a legitmate basis for a plea negotiation is a defendant's expectation that by offering a plea he will receive a more lenient sentence or that he will avoid a substantial sentence after a jury returns a guilty verdict. See Brady v. United States, 397 U.S. 742, 751 (1970). In Corbitt v. New Jersey, 439 U.S. 212 (1978) this court stated unequivocally

> "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. [footnote omitted] Specifically, there is no per se rule against encouraging guilty pleas" Corbitt at 218-219.

The Court also cited with approval the language of Chaffin v. Stynchombe, 412 U.S. 17, at 31 (1973)

> '"While confronting a defendant with the risk of more severe punishment clearly may have a

> discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable 'and permissable - ' attribute of any legitimate system which tolerates and encourages the negotiation of pleas"'

Corbitt, at 220.

Given this Court's acceptance of the realties of plea bargaining and in the absence of any indication that judicial participation in that process is totally barred by the Fourteenth Amendment, the rule of Pearce is not applicable. What the Constitution forbids, it is submitted, is either judicial coercion to plead or the vindictive imposition of punishment for assertion of a constitutional right to a trial by jury. Here no plea was coerced; no plea was proffered. Moreover, it is submitted that the record does not support a finding of vindictive imposition of a

stiff punishment, but rather imposition of a punishment based upon the evidence at trial and the defendant's lengthy criminal record. It is submitted that the judgment, as to either coercion on vindictiveness is not as the Court of Appeals has held, to be made by speculation as to the subjective perception of the defendant, but on the objective record facts. See Housewright, at 991.

B. The Court of Appeals Has Applied An Incorrect Standard.

It is further submitted that the Court of Appeals errs and is in conflict with the decisions of this Court and other circuits in applying a subjective possible "appearance of vindictiveness" standard rather than requiring an "objective realistic likelihood of vindictiveness" standard. The latter standard is

consistent with this Court's statement in Colten v. Kentucky, supra that due process is violated if an increased sentence was imposed "as purposeful punishment"; it is consistent with the dispositive basis for this Court's dismissal of the Writ of Certiorari as improvidently granted in Moon v. Maryland, 398 U.S. 319, 312 (1970), for the reason that petitioner did not contend that the judge below was vindictive; and it is consistent with this court's language throughout Bordenkircher in which no reference to "apprehension of vindictiveness" is made. See Bordenkircher, supra at 362, 363.

The standard applied by the First Circuit Court of Appeals is not only in conflict with the above decisions of this court, but is in conflict with the standard

applied by the Fifth Circuit in Hardwick v. Doolittle, 558 F.2d 292 (1977), (requiring vindictiveness in fact) and the Sixth Circuit in United States v. Andrews, 633 F.2d 449, 454 (6th Cir. 1980) (the standard is an objective one, not depending on a defendant's subjective impressions). But see, United States v. Goodwin, 637 F.2d 250 (4th Cir. 1981).

In Andrews the Court, in rejecting the standard utilized by the lower court discussed the division in the Circuits.

> The district court followed the rule used in a series of Ninth Circuit decisions. Where a prosecutor adds on charges after the defendant exercises a procedural right. United States v. Groves, 571 F.2d 450 (9th Cir. 1978); United States v. Alvardo-Sandoval, 557 F.2d 645 (9th Cir. 1977); United States v. DeMarco, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827, 98 S. Ct. 105, 54 L.Ed. 2d 85 (1977); United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976).

But see United States v. Preciado-Gomez, 529 F.2d 935 (9th Cir.), cert. denied, 425 U.S. 953, 96 S. Ct. 1730, 48 L.Ed. 2d 197 (1976).

The Fifth Circuit has advanced varying standards. If a prosecutor adds on charges relating to separate criminal acts, in apparent retaliation against a defendant's exercise of a procedural right, the prosecutor need only present non-vindictive reasons to justify his behavior. Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S. Ct. 897, 34 L.Ed. 2d 801 (1978). If the added-on charges relate to the same basic criminal activity which was the subject of the original indictment, then the Fifth Circuit applies a balancing test. Applying this test, a court determines whether to bar the added charge or, as in Hardwick, to allow any non-vindictive explanation to justify the prosecutor's conduct. Jackson v. Walker, 585 F.2d 139 (5th Cir. 1978). See United States v. Thomas, 593 F.2d 615, 624 (5th Cir. 1979), appeal after emand, 617 F. 2d 436 (1980); Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979).

> The other courts of appeals have dealt with vindictiveness questions on an ad hoc basis. See United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974); Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979); cert. denied., ____ U.S. ____, 100 S. Ct. 3038, 65 L.E.2d 1130 (1980); United States v. Ricard, 563 F.2d 45 (2d Cir. 1977); United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976); United States v. Partyka, 561 F.2d 118 (9th Cir. 1977). See also United States v. McFadyen-Snider, 590 F.2d 654 (6th Cir. 1979) (perjury indictment would probably not have been brought had defendant not succeeded in her appeal from an initial conviction.)
>
> See the discussion of the above cases in the panel decision. United States v. Andrews, 612 F.2d 235, 242-44 (6th Cir. 1979) (opinion of Green, J.); id. at 250-52 (Keith, J., dissenting).

Andrews supra at 453, n.4.

Resolution of the question of what Due Process requires must come from this Court especially where the conduct complained of is judicial in nature. Furthermore, it is submitted that where as here the highest

court of a state has found a judge's remarks to be entirely appropriate it is inappropriate for a federal court on habeas corpus review to disregard that decision on the basis of what it believes the defendant might have gleaned from the court's remarks. The decision below is not only not constitutionally required, but it violates principle of comity and federalism.

CONCLUSION.

For the reasons stated above the petitioners submit that a writ of certiorari should be granted.

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

STEPHEN R. DELINSKY
Chief, Criminal Bureau

By: Barbara A.H. Smith
BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, MA 02108
727-2240

Appendix

United States Court of Appeals
For the First Circuit

No. 80-1503

NORMAN L. LONGVAL,
PETITIONER-APPELLANT,

v.

LAWRENCE R. MEACHUM, Et Al.,
RESPONDENTS-APPELLEES.

APPEAL FROM THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Corey M. Belobrow, Boston University Law Student, with whom *John Leubsdorf*, Associate Professor of Law, Court appointed counsel, *Jeffrey Lesser*, *Christine Schwab*, and *James R. Wacht*, Boston University Law Students, were on brief, for appellant.

Annette C. Benedetto, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Barbara A.H. Smith*, Assistant Attorney General, Chief, Criminal Appellate Division, were on brief, for appellees.

June 19, 1981

BOWNES, *Circuit Judge*. Appellant Norman Longval appeals from a judgment of dismissal entered by the United States District Court for the District of Massachusetts denying his petition for habeas corpus. The petition challenged Longval's original forty to fifty-year prison sentence as an unconstitutional punishment for his exercise of the right to trial. We reverse and remand for resentencing de novo.

Longval was indicted jointly with Richard T. Ellard and Kenneth M. Golden on two charges of armed robbery of a pharmacy, assault by means of a dangerous weapon, unlawfully carrying a sawed-off shotgun, and using a motor vehicle without authority. Ellard pled guilty to all indictments[1] and was given sentences totalling three years in the Billerica House of Corrections — two years on the assualt with a dangerous weapon charge and one year on the motor vehicle charge — and a consecutive term of three years' probation. Longval and Golden pled not guilty; the jury trial was conducted by the same judge who sentenced Ellard. Longval was convicted on all indictments and sentenced to concurrent terms of 32 to 40 years on the two armed robbery charges, and concurrent terms of eight to ten years on the assault and gun carrying charges, to be served from and after the sentences for armed robbery. The eight to ten-year sentence for assault with a dangerous weapon was in excess of the five-year statutory maximum. Mass. Gen. Laws Ann. ch. 265, § 15B. Golden was acquitted on all indictments.

On sentence appeal, the Appellate Division reduced Longval's sentence as follows: concurrent terms of 30 to 40 years on the armed robbery indictments and lesser terms as to the other sentences,[2] all to be served concurrently with the sentence for armed robbery.

Longval then appealed pursuant to Mass. Gen. Laws Ann. ch. 278, §§ 33A-G claiming that the court abused its discretion in sentencing, that the sentences were unlawfully disparate when compared with Ellard's terms, and, further, that the trial judge unconstitutionally punished him for exercising his right to trial. He subsequently filed a petition for a writ of

[1] The Massachusetts Supreme Judicial Court uses the term "indictments" to describe what would be called "counts" in federal parlance.

[2] The other reduced sentences were four to five years on the assault with a dangerous weapon charge, and eight to ten years on the charge of carrying a dangerous weapon.

error in the Supreme Judicial Court attacking his sentences. Because the petition referred to matters outside the record, the Single Justice, handling the matter, ordered the record on appeal expanded to include the transcript of Ellard's plea and sentencing. A special master was appointed to report on the substance of an unrecorded lobby conference between the court, counsel for defendant, and the assistant district attorney. The master held a hearing at which he received testimony from all but the trial judge.[3] Because defense counsel and the government prosecutor agreed that the trial transcript made no reference to the lobby conference in question, the master made his findings without reading the transcript. The master found that, before Longval had an opportunity to present his evidence, there was a lobby conference at which the judge stated in essence to defense counsel:[4]

> Mr. Primason, the evidence in this case as it is coming in is very serious, — robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial.

The Supreme Judicial Court affirmed the judgments of conviction, *Commonwealth* v. *Longval*, 390 N.E.2d 1117 (1980), and rejected appellant's claim that he was punished for exer-

[3] Both counsel were afforded the opportunity to call the judge as a witness, but chose not to do so; they did consult with him by telephone and he stated that, although one might have taken place, he could not recall any lobby conference.

[4] The government attorney could not remember the lobby conference and the special master's findings were, therefore, based largely on the testimony of Longval's defense counsel.

cising his right to trial. The court recognized the constitutional principle that a defendant is entitled to exercise his right to trial free from the threat of punishment, but did not "read the words of the judge ... as supporting an inference of ... punishment or threat of punishment," *id.* at 1120, and concluded that his statements were not "inappropriate." *Id.* It held that the widely disparate sentences as between Ellard and Longval were justified by their widely disparate criminal records.

Appellant next filed a petition for a writ of habeas corpus in the district court, charging that his due process rights had been violated because he was penalized for exercising his right to trial by jury. The court dismissed the petition without opinion and subsequently declined to certify probable cause, stating that the application and appeal were "frivolous." This court granted a certificate of probable cause on August 3, 1980. Before us, Longval presses the arguments that the trial court of the Commonwealth violated his constitutional rights by imposing a substantial prison sentence because he chose to plead not guilty and proceed to trial, that the Appellate Division's reduction of his sentence to 30-40 years does not expunge beyond a reasonable doubt the taint of unconstitutionality, and that the violation and its effects will not be removed unless he is sentenced de novo by a different judge.

With respect to appellant's first argument, we begin with the premise that those who choose to exercise the rights which our judicial system confers must be able to do so without fear of penalty. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Thus, the Supreme Court has protected defendants who exercise their right to appeal from possible vindictiveness on the part of the trial judge, *see North Carolina* v. *Pearce*, 395 U.S. 711 (1969), or the prosecutor, *see Blackledge* v. *Perry*, 417 U.S. 21 (1974). This court has held that the accused

"should not have to fear even the possibility," *Marano* v. *United States*, 374 F.2d 583, 585 (1st Cir. 1967), that he will suffer a penalty for exercising his rights. *See Lovett* v. *Butterworth*, 610 F.2d 1002, 1005 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 3038 (1980). The court in *Pearce* held that "due process ... requires that a defendant be freed of the apprehension of such retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. In *Lovett*, we quoted approvingly the view that:

> "In effect, *Blackledge* sets up a per se rule ... that in some situations a due process violation can be established by a showing that defendants might have a reasonable apprehension of prosecutorial vindictiveness, without a showing that the prosecutor actually had a vindictive or retaliatory motive to deter appeals." *Jackson* v. *Walker*, 585 F.2d at 143. "The semblance of vindictiveness that arises from the imposition of a harsher sentence the second time around must be obviated so that the proceedings do not leave the impression of unfairness to the defendant ... and so that other defendants are not deterred from exercising rights of appeal due to apprehension of vindictiveness." *United States* v. *Tucker*, 581 F.2d 602 (7th Cir. 1978). Otherwise the situation is too suggestive of the possibility of vindictive motive. "Due process of law requires that such a potential for vindictiveness not enter into [Massachusetts'] two-tiered appellate process." *Blackledge* v. *Perry*, 417 U.S. at 28, 94 S.Ct. at 2103.

610 F.2d at 1007 (footnote omitted).

The rationale of *Pearce-Blackledge* is applicable to the case at hand. Our review leads us to conclude that the judge's remarks could reasonably have had a chilling effect on the exercise of the defendant's right to trial by jury. The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its cap-

acity to do so. It matters not whether the trial judge actually meant to issue such a threat; whether his remarks could create a "reasonable apprehension of vindictiveness" is the issue. *Cf. Lovett* v. *Butterworth*, 610 F.2d at 1007. With all due respect and deference to the special master and the Supreme Judicial Court of Massachusetts, we believe the words of the judge could well have been understood by defense counsel as a "plea or else" admonition.

In reaching this view, we recognize once more that "it is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." *Worcester* v. *Commissioner of Internal Revenue*, 370 F.2d 713, 718 (1st Cir. 1966). The words of an outstanding federal trial judge bear repeating:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer of shorter duration, is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence.

United States ex rel. Elksnis v. *Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (footnote omitted). We readily accept the master's finding that the trial judge in this case acted with the best of intentions; but we think it clear that, viewed from the crucial perspective of the defendant, the judge's statements

could reasonbly have been understood as a threat.

A judge who participates in plea bargaining "is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he has suggested to the defendant." *United States* v. *Werker*, 535 F.2d 198, 203 (2d Cir.), *cert. denied*, 429 U.S. 926 (1976).

Under the circumstances, this case must be remanded for resentencing. That the Appellate Division reduced the sentences does not remove the unconstitutional taint. In reaching its decision, it did not address the constitutional issues and did not have the report of the special master. Thus its consideration of appellant's sentence was necessarily limited to the disparity of sentences alone, and could not serve to remove the taint given that disparity by the trial judge's remarks. There are no absolutes as to whether a remand should be to the original judge or to another, *O'Shea* v. *United States*, 491 F.2d 774, 778 (1st Cir. 1974). The nature of the particular situation may vary from case to case. Generally, however, it "is difficult for a judge, having once made up his mind, to resentence a defendant." *Mawson* v. *United States*, 463 F.2d 29, 31 (1st Cir. 1972). Where, as in the case at hand, there exists the possible appearance of vindictiveness, then the case should be remanded for resentencing by a different judge. This fosters the appearance of justice, even though the sentencing judge may be able to act impartially.

The writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice, other than the one who presided at his trial.

/ dm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX "B"

COMMONWEALTH vs. NORMAN L. LONGVAL.

Essex. March 6, 1979. - June 12, 1979.

Present: Hennessey, C.J., Quirico, Kaplan, Wilkins, & Abrams, JJ.

Practice, Criminal, Sentence.

Indictments found and returned in the Superior Court on September 9, 1975.

The cases were tried before Donahue, J.

The Supreme Judicial Court granted a request for direct appellate review.

Beth H. Saltzman for the defendant.
Patrick J. Riley, Assistant District Attorney, for the Commonwealth.

HENNESSEY, C.J. The single issue presented by the defendant is whether State prison sentences imposed on him totaling forty to fifty years, and later reduced by the Appellate Division of the Superior Court to thirty to forty years, were

grossly and unlawfully disparate from a codefendant's sentences to three years in a house of correction and an additional term of probation.

Norman L. Longval, Richart T. Ellard, and Kenneth M. Golden were indicted jointly on two charges of armed robbery, assault by means of a dangerous weapon, unlawfully carrying a sawed-off shotgun, and using a motor vehicle without authority. All of the defendants appeared before a judge of the Superior Court on November 6, 1975.

Ellard pled guilty to all indictments and was sentenced as follows: two years in a house of correction on the assault by means of a dangerous weapon charge; one year in a house of correction on the motor vehicle charge, to be served from and after

the first sentence imposed; and three years probation on the armed robbery charge, to run from and after the second sentence imposed. The other indictments were filed.

Longval and Golden had a trial by jury from November 6 until November 10, 1975, before the same judge who sentenced Ellard. Longval was convicted on all indictments and was sentenced as follows: concurrent terms of thirty-two years to forty years at Massachusetts Correctional Institution, Walpole, on the armed robbery charges, and concurrent terms of eight to ten years on the assault and gun carrying charges, to run from and after the sentences for armed robbery. The motor vehicle charge was filed. Golden was acquitted on all indictments.

As a result of a sentence appeal, Longval's sentences were reduced by the Appellate Division as follows: concurrent terms of thirty to forty years on the armed robbery indictments, and lesser terms as to the other sentences, all to be served concurrently with the sentences for armed robbery.

On his appeal pursuant to G. L. c. 278, §§ 33-A-33G, Longval assigned one error dealing with the disparity between his sentences and those given Ellard. Subsequently, Longval filed a petition for a writ of error in this court attacking his sentences and referring to matters outside the record on appeal. A single justice of this court declined to issue the writ, but instead ordered the record on appeal to be

expanded to include the transcript of Ellard's plea and sentencing and, by report of a special master, to include the substance of an unrecorded lobby conference between the sentencing judge and the counsel in the case. After a hearing, the special master found that in an unrecorded conference during the presentation of the Commonwealth's case, the judge said to Longval's counsel: "[T]he evidence in this case as it is coming in is very serious - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I

might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial." The master found that the judge was referring to "very substantial sentences" imposed that month on three codefendants after jury verdicts of guilty.

At the hearing during which Ellard pleaded guilty, the prosecutor read a police report of the incident, which contained a statement given by one Arthur M. Kelley. According to that statement, Kelley and one Michael Coraine were working in a drugstore in Swampscott when a man came behind the prescription counter "jabbing" a shortbarreled gun at them and saying, "I want narcotics, the morphine,

all the Class A's." As Kelley filled bags with narcotics from the medicine cabinet, the man told Coraine to lie down and took a five-dollar bill from Coraine's wallet. Another man, Ellard, came up with a knife and told the first man to hurry up. The first man directed Coraine to open the cash register and told Kelley to lie still on the floor, saying, "If you move, I'll blow your brains out." Before leaving in a Chevrolet automobile, the men further threatened them, saying, "Don't move or we'll blow your brains out. Stay put for five minutes."

The police report further indicated that in response to a radio report, officers in a police vehicle chased the Chevrolet. A person on the passenger's side shot at them but missed.

During examination by the judge, Ellard said that he had suffered blackouts from drinking and had an alcohol problem but was not presently addicted to alcohol. Although admitting involvement in the crimes, he said he was drunk at the time, did not use the shotgun, and did not threaten anyone with the kife he carried.

After accepting Ellard's pleas, the judge heard the prosecutor's recommendation: a three- to five-year State prison sentence on the two armed robbery indictments to be served at a house of correction. Observing to defense counsel that "we had an informal conference on this matter this morning," the judge said, "I have gone through the probation record, and I'm aware that this defendant

has not been in any real serious trouble prior to this event of June of this year. And I think his problem is primarily alcohol." Defense counsel added "[F]or the last eleven years he has had a problem, and as a result has lost jobs, his family, his wife," and asked that the assistant district attorney's recommendation be adopted. The judge, in imposing sentences totaling three years in the Billerica House of Correction and a consecutive term of three years' probation, noted that alcohol treatment was available at Billerica. He also imposed as a special term of probation that Ellard "seek and sustain alcoholic treatment."

At Longval and Golden's trial, the Commonwealth called seven witnesses.

Kelley and Coraine testified in a manner generally consistent with Kelley's statement to the police. They identified Longval as the man who carried the shotgun while in the pharmacy. Neither witness could identify Golden or say whether he was in the getaway car.

Police witnesses identified Longval as the driver of the green Chevrolet they chased and Golden as the front seat passenger who shot at them while the car was taking a curve at a high speed, about 150 feet in front of their cruiser. They described the arrests of Longval and Golden at separate locations in Marblehead, Golden denied participation in the crimes and said he had been jogging.

After the Commonwealth rested, Longval testified. Longval stated that he went to the Bickford Pharmacy with Ellard in a car he previously had stolen, and that no third person accompanied them. Inside the pharmacy, Longval carried the gun, which he had obtained from a friend of Ellard. He further testified that during the chase, he drove and Ellard used the gun to shoot at the police; that Golden was not present and did not participate in the crimes; and that he first saw him that day at the Swampscott police station. Golden did not testify.

After the jury convicted him on all indictments, Longval was sentenced. The prosecutor recommended a State prison sentence of thirty-two to forty years for armed robbery and a consecutive eight- to

ten-year sentence for assault by means of a dangerous weapon. He made no recommendation on the remaining indictments.

Defense counsel advised the judge that Longval was thirty-six years old. Stating that his client had testified "in an effort to see to it that justice was done in a case of a fellow he felt was wrongfully accused," counsel suggested that "the Court should take into consideration that factor in his favor." Counsel acknowledged that Longval was no stranger to the courts, had a previous record for larcenies, and had served a five- to eight-year sentence at the Correctional Institution at Walpole for armed robbery. However he pointed out that the record reflected an involvement with narcotics as early as 1960 and, except for

the armed robbery conviction, a "rather obvious lack of violence."[1/]

Defense counsel suggested that the crimes were serious, but that a sentence of fifteen to thirty years would be adequate punishment. He made no mention of the sentences given Ellard.

Essentially adopting the prosecutor's recommendation, the judge sentenced Longval to State prison terms totaling forty to fifty years. He gave no reasons for the sentences imposed. Subsequently, after a hearing, the Appellate Division of the Superior Court reduced Longval's sentences. The revised sentences totaled

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1/However, the judge had learned that Longval had recently escaped from the Salem House of Correction and that a firearm had been involved.

thirty to forty years at Walpole.[2/]

We turn first to the defendant's assertions based on constitutional considerations. The defendant, we think correctly, does not rely on the constitutional prohibitions against cruel and unusual punishment, as contained in the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. See Commonwealth v. O'Neal, 369 Mass. 242, 246-250 (1975) (Tauro, C.J., concurring), and cases cited. These constitutional principles do not reach this case. The applicable statute, G. L. c. 265, § 17,

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2/In so doing the Appellate Division corrected one of the lesser sentences which exceeded the statutory limit but which was a concurrent sentence and did not affect the total time to be served.

establishes the extreme seriousness of the crime of armed robbery, in its provision that sentence may be imposed of any term of years up to life imprisonment.

Rather, the defendant argues that to the extent a trial judge punishes a defendant for having a trial by jury, he commits constitutional error, citing United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948 (1973), or at least abuses his discretion, citing United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960). We agree with the defendant's premise. However, it is not applicable here, on the facts of this case. We do not read the words of the judge, quoted supra, as supporting an inference of such punishment or threat of

punishment. His words directed the attention of defense counsel to sentences he had imposed in other unrelated cases; they commented on the serious nature of the offense as shown in the evidence at the trial; and they advised the defendant through his counsel, not to forgo any advantage that might accrue to the defendant by means of plea bargaining and a resulting recommendation to the court by the prosecutor, as to the sentence.

There was nothing inappropriate in thse comments by the judge. To read into the words the meaning now urged by the defendant is to strain their plain language. Even if we were to accept the premise that there is ambiguity in the phrasing, we would decline to reach as far

as the defendant does to force an inference of an unlawful meaning in the words.

Beyond the constitutional arguments, the defendant urges that this court should correct "legal error" in the sentence imposed. It is true that error of law which occurs in sentencing is an appropriate matter for appellate relief. See Commonwealth v. Sitko, 372 Mass. 305, - (1977);[a/] Commonwealth v. LeBlanc, 370 Mass. 217, 222-225 (1976); Commonwealth v. Franks, 369 Mass. 608, 609 (1976). Yet, in this case there was no error of law; the sentences imposed were within the broad discretion afforded to the judge in the statutes. However, the defendant argues that there is such great disparity

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a/Mass. Adv. Sh. (1977) 668, 676-678.

between the punishment of Ellard and the defendant as to require a remedy.

The defendant concedes that his premise is unprecedented in this jurisdiction. The Appellate Division of the Superior Court is the appropriate forum for relief against unfair disparity, and in this case the Appellate Division has already afforded a large measure of relief in reducing the sentence by ten years. However, the defendant argues that special principles apply to the sentencing of coparticipants in the same crime, and that equal participants should be given comparable sentences, at least where they have similar backgrounds, citing United States v. Williams, 499 F.2d 52, 56 (1st Cir. 1974),

and Burleson v. State, 543 P.2d 1195, 1201 (Alaska 1975).

We agree that this court should review sentences for errors of law or constitutional violation, but we do not accept the premise that we ordinarily have jurisdiction to review for alleged disparity. We do not say that there may never be a case in which the sentence is so severe or the demonstrated disparity so great as to amount to an abuse of discretion and, thus, present an appropriate subject for our review. See G. L. c. 211, § 3. We add that, even were we to reach the merits of this case, and consider what is urged here to be wide disparity of punishment between coparticipants, we can see ample

justification for the sentences imposed. In addition to the nature of the offense, a wide variety of factors can be taken into account, such as the defendant's character, background and prior record. Commonwealth v. Celeste, 358 Mass. 307, 310 (1970). Letters v. Commonwealth, 346 Mass. 403, 405 (1963). While the defendant concedes that he appartnely conceived and led the robbery, and carried the more dangerous weapon inside the pharmacy, he argues that there was similarity between the two men in age, background, and participation in the robbery.

The Superior Court judge, and subsequently the Appellate Division, were justified in concluding that widely disparate sentences, as between Ellard and

the defendant, were warranted by their widely disparate criminal records. By consent of the parties, we have examined the prior records of both men. Ellard's record may fairly be said to include a number of prior offenses, but all of minor or trivial nature, with none involving violence or the likelihood of violence until he was involved in the instant armed robbery. The defendant, on the other hand, has a record of almost twenty years of repeated, serious offenses, most involving stealing in some form, and some involving breaking and entering. He has served prison terms on a number of occasions. Perhaps overriding importance is the fact that the defendant served a prior five- to eight-year sentence for armed robbery. In all, the judge could conclude, and

obviously did, that the defendant was a confirmed and dangerous offender.[3/]

Judgments affirmed.

3/We do not consider the arguments that another judge might not have sentenced the defendant so severely, or that the judge should have made written findings as to the sentence imposed, especially since a coparticipant was sentenced. These questions concern the greater issue as to whether the sentencing discretion of judges should be limited, and this is a matter now under legislative consideration.

APPENDIX "C"

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FULL COURT NO. 1635

COMMONWEALTH OF MASSACHUSETTS

vs.

NORMAN L. LONGVAL

REPORT OF SPECIAL MASTER
AND COMMISSIONER

Background Findings

1. On this appeal from conviction of Longval on various indictments (R. 2-8), certain expansions of the record were made in the Appeals Court in the manner described on page 3 of Longval's "Memorandum in Support of Application for Direct Appellate Review". A copy of that page 3 is annexed marked Annex 1. By order

of the Full Court dated November 21, 1978 (copy annexed marked Annex 2), the matter of expanding the record in respect of the lobby conference, asserted to have taken place in the footnote on page 3 of Annex 1, was referred to me to report the facts as found by me concerning the existence of such a conference and the events and discussion, if any, there taking place.

2. After a pretrial conference, I held a hearing on November 28, 1978, at which testimony was offered by present counsel for Longval and by an Assistant District Attorney from Essex County. The testimony was somewhat conflicting.

Trial counsel for Longval (Mr. Primason) testified to facts upon which I largely base the findings made by me below

in paragraphs 3 to 7. The former Assistant District Attorney who tried the cases for the Commonwealth (Mr. Kelleher) remembers no bench or lobby conference during the trial of these cases in which any discussion of plea bargaining went on. Both present counsel agreed before me (1) that the trial transcript shows no such conference and (2) that there was no occasion for my reading any part of the trial transcript.

Findings Concerning Alleged Conference

3. The criminal cases against Longval were tried at Lawrence before Judge Donahue from November 6 until November 10, 1975. R. 1. The defendant was represented by Mr. Webb Primason, then a young attorney

with the Massachusetts Defenders Committee, with his office in Salem. It was his first representation of a criminal defendant before a jury. The Commonwealth was represented by Mr. Richard Kelleher, an Assistant District Attorney. Each of them testified before me. Each of them appeared to me to be testifying honestly and truthfully. Mr. Kelleher had no memory of any 1975 conference in the Judges' lobby or elsewhere in which plea negotiations were mentioned. He conceded that there might have been such a conference but has no memory of one. Mr. Primason remembers such a conference in the Judges' lobby at which Judge Donahue, Mr. Primason, and Mr. Kelleher were present but at which no clerk or court stenographer was present. It was

the first time Mr. Primason had been in Judge Donahue's lobby and (as noted above) the first jury criminal case he had tried.

4. Mr. Primason does not remember the occasion for the lobby conference, but now thinks that it was called by some party or the judge for a discussion of some matter other than plea negotiations. His recollection is that the lobby conference took place during the presentation of the Commonwealth's case, but before the Commonwealth had rested, and that other witnesses were called by the Commonwealth after the conference. Mr. Primason, however, conceded that as to (a) the occasion for, and (b) the time in the trial of, the conference his memory is not

precise and that his memory may be faulty. I regard these matters mentioned above in this paragraph as unimportant and largely immaterial. I personally pressed him, after somewhat general testimony, to be as precise as possible concerning what Judge Donahue said, and he replied (and I find his statement to represent the facts) that Judge Donahue said in substance the following (not purporting however, to quote the Judge with much precision,) - Mr. Primason, the evidence in this case as it is coming in is very serious, - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client

to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. See par. 5, below. [I took careful and almost verbatim notes of this answer and read my notes back to Mr. Primason. He said that this statement is accurate to the best of his memory.]

5. The reference to a previous trial was to a sentence imposed by Judge Donahue in criminal cases (against defendants named Hogan, Aterone, and LaRocque) tried in Lawrence late in October, 1975, or early November, 1975. These cases involved kidnapping of a woman (wife of the debtor

mentioned later and mayhem against that debtor (who owed money to a codefendant) to coerce payment of the debt. Judge Donahue had imposed very substantial sentences after jury verdicts of guilty. Nothing in the context of the conference as described to me in testimony led me to construe the Judge's remarks as in any sense a threat but merely as a statement to a young lawyer of the Judge's then general impression of the evidence as it had developed to that point. There was (as Mr. Primason testified) no reference by the Judge at the conference to a sentence of "fifteen to twenty years". No specific term was mentioned during the conference.

6. There had been, before trial, a plea bargaining conference between the

Assistant District Attorney, Mr. Kelleher, and a Mr. Chouinard, counsel for one Golden, a codefendant. Mr. Primason had been present at that conference solely for the purpose of keeping informed. He had not participated in any plea bargaining because he had not been authorized to do so by his client, Longval. At that conference, Mr. Chouinard had asked if the Assistant District Attorney would recommend fifteen to twenty years in the event of a plea of guilty by Golden. Mr. Kelleher had consulted a senior assistant and the Swampscott prosecutor, a lieutenant Cassidy, who felt the case against Golden was "air tight". No recommendation was made.

7. Mr. Primason reported to his client Longval the discussion at (a) the

lobby conference and (b) the pretrial plea bargaining conference. The petition for a writ of error, Supreme Judicial Court, Suffolk No. 78-155 CIV, and the footnote on page 3 of Longval's "Memorandum in Support of Application for Direct Appellate Review." (see Annex 1), were prepared, in good faith, by Longval's present counsel (Miss Susan J. Baronoff of the Massachusetts Defenders Committee) on the basis of information furnished to her by Longval. I find and conclude that those documents (especially paragraph 6 of the petition for a writ of error) do not accurately state what went on at the lobby conference and that information about that conference was inaccurately conveyed to Miss Baronoff. The footnote to Annex 1

greatly overstates and misstates the Judge's remarks at the lobby conference, as disclosed in testimony before me.[1/]

8. At the close of the testimony before me, I afforded counsel opportunity to consult Judge Donahue to see whether they, or either of them, wished to call him as a witness before me. They did consult the Judge and decided not to call him as a witness. He, by telephone, had expressed willingness to appear and testify before me if called. He said he could not recall any lobby conference at this late date although one might have taken place. In view of

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1/I make no finding on the cause of the misinformation furnished to Miss Baronoff or how it occurred. See p. 2 of her objections and suggestions attached as Annex 3.

counsel's position, I saw no occasion for inquiry of the Judge.

9. I find and conclude that the facts concerning the conference are as stated in the foregoing report.

10. I attach as Annex 3, the objections and suggestions to my draft report filed by Miss Baronoff. I have added footnote 1, page 6, supra, to meet her second objection.

As to her objection to the next to last sentence of par. 5, page 5, supra, any conclusion in that sentence reflects my reaction tc all Mr. Primason's testimony. The specific statement of what Judge Donahue said at the lobby conference appears in par. 4, page 4, above.

11. A copy of a draft report (in all substantial respects as it appears above,

except for pars. 10 and 11, footnote 1, page 6, and annex 3) was sent to counsel on December 1. Each attorney has notified me that he or she does not desire to be heard further before me.

Respectfully Submitted,

Special Master and
Commissioner

December 7, 1978

Opposition

ORIGINAL

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No. 81-261

In the Supreme Court of the United States

October Term, 1980

LAWRENCE R. MEACHUM, et al.,

Petitioners,

v.

NORMAN L. LONGVAL,

Respondent

On Petition for Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

John Leubsdorf
Professor of Law
Boston Univerasity School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617-353-4420)
Counsel for Respondent Longval

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No. 81-261

In the Supreme Court of the United States

October Term, 1980

LAWRENCE R. MEACHUM, et al.,

Petitioners

v.

NORMAN L. LONGVAL,

Respondent

Respondent's Opposition to Petition for Certiorari

Respondent Norman Longval urges that certiorari not be granted, for the following reasons. Since parts II and III of this Opposition are summarized in parts I(A) and (B), no further summary of argument will be included.

Argument

I. THIS CASE PRESENTS NO ISSUE WARRANTING CERTIORARI.

A) The Court of Appeals Simply Applied an Accepted Principle to Unusual Facts.

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Bordenkircher v. Hayes, 434 U. S. 357, 363 (1978). All the Court of Appeals did was to apply this ordinary rule to extraordinary facts, using a traditional objective standard which looks to whether the judge's words and deeds created a "reasonable apprehension of vindictiveness" or on the contrary could be explained as implementing valid state concerns. The Petition does not challenge such an objective standard, but vigorously supports it (pp. 23-27). And extreme facts show that the standard was satisfied: a judge who interrupted the trial at which he was presiding to "strongly suggest" a guilty plea "because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence" (Pet. App. A, p. 3); the complete gratuity of this judicial intervention, no previous plea bargaining involving this defendant having occurred (Pet. App. C, pp. 8-9); the judge's subsequent imposition of a forty to fifty year sentence for a drugstore robbery in which no one was injured--a sentence so long that it exceeded the state statutory maximum (Pet. App. A, p. 2); the fact that this sentence was more than thirteen times as long as the three year sentence given a codefendant who pled guilty (id.); the fact that the defendant took the stand to admit his part in the crime and exculpate a third codefendant (who was then acquitted), (Pet. App. B, p. 11), thereby dispelling any doubt

that his refusal to plead guilty might cast on his willingness to enter prison in a proper state of mind for rehabilitation; and the total failure of the judge to give any proper reason for his massive sentence (Pet. App. B, p. 13). (See part II below for fuller discussion.) Since these facts are extreme indeed, and since the principle which the Court of Appeals applied to them is fully accepted, review by this Court would serve no purpose.

B) The Broad Issues Argued by the Petition Are Not Present in this Case.

The Court of Appeals did not hold or say, as the Petition intimates (p. 19), that a "judge may not make any statements with regard to plea bargaining." It held unconstitutional only one extraordinary set of judicial words and deeds, (See part II, sections 1 and 2 below.) Nor did the Court of Appeals hold or say that "a defendant's subjective perception of possible vindictiveness is the proper standard" (Pet., p. ii). On the contrary, the Court said that whether the judge created "a 'reasonable apprehension of vindictiveness' is the issue" (Pet. App. A, p. 6; accord, pp. 5, 7). The Court assessed the reasonableness of the apprehension objectively, by looking at what the trial judge said and did; it expressly disclaimed (id., p. 6) a subjective approach such as the Petition (pp. ii, 23-27) criticizes at length. (See also part II below.) The Petition misses the mark once more when it speaks of "rejection of the state courts findings" by the Court of Appeals (Pet., pp. 9, 18). The Court of Appeals said that "We readily accept the master's finding" (Pet. App. A, p. 6; emphasis added), and explained at length (id., pp. 5-7) why that finding did not bar respondent Longval's claim. (See part III below for more explanation.) Since the rulings which the Petition seeks to challenge were simply never made in this case, this Court should not grant further review.

C) The Practical Impact of this Case will be Minor and Unobjectionable.

Just as the Court of Appeals' decision created no legal holdings of general significance, so also it caused no objectionable outcome in this particular case. The Court of Appeals did not require Longval's release or even retrial. All the Commonwealth need do is to resentence him (Pet. App. A, p. 7). This can be done quickly and cheaply. If there are good reasons for a long sentence, one can be imposed. And even were Longval to be released immediately, he would still have served six years in prison--twice as long as his codefendant who pleaded guilty (Pet. App. B, pp. 2-3).

D) This Proceeding May be Mooted By Pending State Court Proceedings.

The sentence challenged in these habeas corpus proceedings may be vacated by the Massachusetts state courts during the coming months, in which event this

case will become moot. Longval has filed in the state courts a postconviction motion alleging that his lengthy sentence was partly based on prior convictions for which he had no lawyer. This motion came before the same trial judge who imposed the sentence challenged in these habeas corpus proceedings. That judge dismissed the motion sua sponte and without a hearing, on the ground that the issues it raised had been disposed of in Longval's original state court appeal (reported at Pet. App. B). Longval appealed from the dismissal. Both parties have now agreed that the judge's ground for dismissing the motion was wrong, and that Longval should have a hearing on the merits of his claims. The agreement of the parties and the other facts just described are set forth in a Joint Motion to Stay the Appeal and Stipulation, of which a copy is attached to this Opposition. The Massachusetts Appeals Court is expected to hear argument on this Joint Motion and on the underlying appeal in October. If it approves an evidentiary hearing, and if Longval prevails at that hearing, he will have to be resentenced in any event. This Court should not devote its scarce time to a case which could disappear before it can be decided.

II. THE COURT OF APPEALS' RESOLUTION OF THE MERITS WAS PLAINLY CORRECT.

The words and the deeds of the trial judge in this case show that Norman Longval was very substantially punished for claiming his right not to be convicted without a trial. The Court of Appeals' decision poses no threat to plea bargaining or to proper prosecutorial and judicial prerogatives--which that court strongly upheld a month before deciding this case when it rejected a claim that another defendant was punished for claiming a de novo trial. Koski v. Samaha, 648 F.2d 790 (1st Cir. 1981). If judges can freely promise and impose a sentence thirty-seven years longer on a defendant who claims a trial than on one who pleads guilty, even defendants with valid claims of innocence will not dare to assert them.

This Court has repeatedly made clear that a criminal defendant may not be punished for asserting his constitutional right. Bordenkircher v. Hayes, 434 U. S. 357, 363 (1978); Blackledge v. Perry, 417 U. S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969). This principle, of course, extends beyond criminal law. E.g., Givhan v. Western Line Consol. School District, 439 U. S. 410 (1970); Dunn v. Blumstein, 405 U. S. 330 (1972).

It is equally clear that punishment may be shown through objective facts establishing a reasonable appearance of vindictiveness. Blackledge, supra, 417 U.S. at 28; Pearce, supra, 395, U.S. at 725. Any other approach would require probing the subjective intentions of judges and prosecutors, and

require their appearance as witnesses before other state or federal judges. And it would leave defendants who could not prove a judge's actual motives subject to reasonable apprehensions of punishment for exercising their rights. The Petition does not ask this Court to require examination of the judge's actual motives, but vigorously supports an objective standard (pp. 23-27). This Opposition has already noted that such a standard was applied by the Court of Appeals (Pet. App. A, pp. 5-7; see part I(B) supra). Here, many facts support that Court's conclusion that a "reasonable apprehension of vindictiveness" (Pet. App. A, p. 6) was present, and no valid state interest other than punishment can explain what the judge did.

1. Here, it was a judge, not a prosecutor, who held out the prospect of "a substantial prison sentence" to Longval should he fail to plead guilty (Pet. App. A, p. 3)--a striking deviation from his constitutional role which would persuade any reasonable defendant that claiming a trail was dangerous. Here the judge said:

> Mr. Primason, the evidence in this case as it is coming in is very serious,--robbery of a drug store, taking [i.e. theft of] dtrugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. (Pet. App. A, p. 3).

As the Court of Appeals pointed out (Pet. App. A, p. 6 (citing authority)), the words of a trial judge have a huge coercive impact on a defendant whose fate may be in his hands. A trial judge is thus radically different from a prosecutor, on whose relatively equal bargaining power this Court has relied in its plea bargaining cases. E.g., Bordenkircher, supra, 434 U. S. at 362. The state has no valid interest in having its judges urge pleas, since the prosecutor can do so where appropriate. Indeed, the trial judge has a solemn duty to assure an impartial trial of the defendant's guilt or innocence, not to urge him to plead guilty or face a high sentence, See United States v. Werker, 535 F2d 198, 203 (2d Cir.), cert. denied, 429 U. S. 926 (1976). If a probation officer may not constitutionally participate in even an interim probation revocation, Morrissey v. Brewer, 408 U. S. 471, 485-86 (1972), surely a judge who has the power to sentence a defendant to decades in prison should not be actively asking him to plead guilty. If a judge does reach out to initiate such an unnecessary venture, the message to defendants is clear.

2. Here, the circumstances of the judge's involvement powerfully support

an inference of punishment. The judge intervened on his own initiative, there having been no previous plea bargaining involving Longval (Pet. App. C, pp. 8-9). He intervened in the middle of the very trial over which he was supposed to be impartially presiding. He spoke during the prosecution's case (Pet. App. A, p. 3), before he had even heard Longval's side of the story, or seen the probation report. He specifically referred to other cases in which he had given "very substantial" sentences to defendants convicted after trial (Pet. App. B, p. 6).

This is a far cry from the judicial involvement in plea bargaining upheld in the cases cited by the Petition (pp. 19-20).* The experienced judges of the Court of Appeals--two of them former trial judges**--did not forbid such involvement, or restrain uninhibited plea bargaining by prosecutors. They merely set aside extraordinary and unjudicial conduct such as other courts have not hesitated to condemn, E.g., State v. Benfield, 364 N.C. 75, 140 S.E.2d 706 (1965); People v. Clark, 515 P.2d 1242 (Colo. 1973); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U. S. 948 (1973). Indeed, some jurisdictions have gone further than the Court of Appeals did here. E.g., Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); State v. Buckalew, 561 P.2d 289 (Alas, 1977); State v. Cross, 270 S.C. 44, 240 S.E.2d 514 (1977); Fed. R. Crim. P. 11(e)(1); A.B.A. Standards for Criminal Justice, Standard 14-3.3 (c-f)(2d ed. 1980).

3. When Longval declined to plead guilty and was convicted, the trial judge imposed a huge sentence of 40-50 years for involvement in a drugstore robbery in which no one was injured. The sentence was larger than a statutory maximum, and for that and other reasons was later reduced by another state court to 30-40 years (Pet. App. A, p. 2).*** It was far larger than the average

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* United States ex rel. Elias v. McKendrick, 439 F.2d 771 (2d Cir. 1971) (judge's involvement reduced sentence); Brown v. Peyton, 435 F.2d 1352 (4th Cir. 1970), cert. denied, 406 U. S. 1352 (1972) (defentant's lawyer approached judge, who disclosed what sentence he would impose); United States ex rel. Robinson v. Housewright, 525 F.2d (7th Cir. 1975) (prosecutor and defense counsel met with judge, apparently on defense initiative; no indication what judge said); People v. Nichols, 354 N.E.2d 474 (Ill. App. 1976) (judge declined to accept plea because sentence was too low; he then said what sentence was acceptable, in response to defense counsel's question). In the final case cited by the Petition, the judge's involvement was held improper, Anderson v. State, 335 N.E.2d 225 (Ind. 1975) (judge agreed during trial to give specified sentence, though prosecutor had not recommended one; unclear what happened off the record).

** Judge Bownes (who wrote the opinion) has been a state and federal trial judge, and Judge Aldrich has beeen a federal trial judge.

*** The Court of Appeals held that this reduction by the Appellate Division did not render the original error harmless (Pet. App. A, p. 7), and the Petition does not dispute this. Longval will not be eligible for parole until he has served two-thirds of his sentence, unless an improbable collection of officials

sentences which Massachusetts gives even to defendants with criminal records found guilty after trial of crimes of personal violence. Zeisel & Diamond, Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut, 1977 Amer. Bar Foundation Research J. 881, 932 (rape, prior record: 10 years; assault and battery with deadly weapon, jury conviction, prior prison record: 8 years; sum of average for manslaughter and average for robbery, major record: 14 years). This was no mere denial of leniency to an uncooperative defendant, but a punishment of decades in prison.

4. That the judge sentenced Longval to spend more than thirteen times as many years in prison as his codefendant who pleaded guilty (Pet. App. A., p. 2) further buttresses the inference that Longval was punished for claiming a trial. Discrepancies far smaller than this have prompted appellate courts to call for explanations. United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U. S. 948 (1973); United States v. Capriola, 537 F.2d 319 (9th Cir. 1976). Although the codefendant had a shorter prior record than Longval, he did have a prior record, he volunteered to participate in the robbery, and he apparently fired the only shot fired during it from a gun he owned (Pet. App. B, ppl 11, 21; Trial Transcr., pp. 198-99, 201).* Yet the judge gave Longval a prison sentence 37 to 47 years longer than his codefendant's.

A massive discrepancy like this one speaks unequivocally of punishment, and exerts an almost irresistible force on future defendants to plead guilty even when they have valid defenses. See United States v. Porter, 49 U.S.L.W. 2719 (M.D. Tenn. 1981) (giving defendant choice between $15 fine if he pleads and $150 if he is found guilty "nullifies any assurance that a person who chooses" the first fine "is actually guilty"): McCoy & Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 Stan. L. Rev. 887, 926-30 (1980). Compare Corbitt v. New Jersey, 439 U. S. 212, 225 (1978). And the discrepancy was far larger than any valid state interest in encouraging guilty pleas could warrant: even the most dramatic reports on plea bargaining describe sentence ratios of about two

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unite to recommend it. Mass. G.L. c. 127, §133(a).

* Longval was driving the getaway car (Transcr. 103, 141-42, 200) and the gun was fired from the passenger window (Transcr. 112, 142-43), Longval said Ellard, the codefendant who pleaded guilty, fired the gun (Transcr. 200-01), though Ellard denied this (Pet. App. B, p. 8). The police witnesses said that another codefendant, Golden, fired the gun (Transcr. 104-05, 143-46), but Longval denied that Golden was present (Transcr. 211) and the jury acquitted him (Pet. App. B, p. 3).

or three to one between defendants convicted after trial and those pleading guilty.* The judge here thus went far beyond the requirements of even the most formidable plea bargaining system. The decades of additional imprisonment heaped on Longval served no valid state purpose and can only be construed as punishment--not punishment for his crime, but punishment for insisting that he be tried before being sentenced.

5. By taking the stand to describe his participation in the robbery (Pet. App. B, p. 11), Longval showed that he was like a defendant "who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." Brady v. United States, 397 U. S. 742, 753 (1970). The judge's sentence cannot therefore be justified on the traditional ground that one who admits his guilt deserves a lesser sentence than one who falsely denies it. Indeed, Longval's admissions were particularly impressive because they were made without a bargain, solely to establish the innocence of his codefendant Golden (who was then acquitted; Pet. App. B, pp. 3, 11). Most plea bargaining defendants, by contrast, admit their guilt only for the purposes of the bargain, and deny it again afterwards. A. Blumberg, Criminal Justice 89-91 (1967).

6. The powerful evidence of punishment in this record is wholly unrebutted by anything said by the trial judge. The judge gave no explanation whatever for the tremendous sentence he imposed (Pet. App. B, p. 13). That is, he gave no explanation except for his original statement during the trial, warning that, if there were no plea and Longval was convicted, he "might be disposed to impose a substantial prison sentence" (Pet. App. A, p. 3). The Court of Appeals properly concluded that the judge did what he had said he would do.

III. THE COURT OF APPEALS ACCEPTED THE STATE COURTS' FACTUAL FINDINGS.

1. The Petition does not include among the questions for which is seeks review (pp. i, ii) any relating to the Court of Appeals' treatment of the state courts' findings of fact. This Court should hence not consider any such question. But for the sake of completeness, this Opposition goes on to refute

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** Zeisel, The Disposition of Felony Arrests, 1981 Amer. Bar Foundation Research J. 407, 448-49; Uhlman & Walker, "He Takes Some of My Time; I Take Some of His:" An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 L. & Soc'y Rev. 323, 328 (1980); Admin. Office of the U. S. Courts, Federal Offenders in the United States District Courts: 1971, at 13 (1973); Shin, Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes, 1 J. Crim. Justice 27,32 (1973); Cook, Sentencing Behavior of Federal Judges: Draft Cases--1972, 42 U. Cin. L. Rev. 597, 609 (1973).

briefly the Petition's arguments (pp. 9, 18-19) that the Court of Appeals engaged in "rejection of the state courts findings" in violation of Sumner v. Mata, 101 S. Ct. 764 (1980).

2. The Court of Appeals did not violate Sumner because it did not reject any state court findings. It accepted, of course, the state court Master's findings that the trial judge spoke certain words during the trial (Pet. App. A, p. 3; App. C, pp. 6-7). And it also accepted the Master's statement (Pet. App. C, p.8) that he did not "construe" the judge's remarks as a threat:

> It matters not whether the trial judge actually meant to issue such a threat; whether his remarks could create a "reasonable apprehension of vindictiveness" is the issue....
>
> We readily accept the master's finding that the trial judge in this case acted with the best of intentions; but we think it clear that, viewed from the crucial perspective of the defendant, the judge's statement could reasonably have been understood as a threat. Pet. App. A, pp. 6, 7 (emphasis added).

The Court of Appeals thus accepted the state court findings, but concluded--and explained its conclusion--that they did not bar relief for Longval. This was no violation of Sumner, which construed 28 U.S.C. § 2254(d) to require an explanation when the federal courts reject state findings. The Court's willingness to give Sumner a hospitable reception had been shown a month before, when it relied on it in a case similar to this one. Koski v. Samaha, 648 F.2d 790, 800 (1st Cir. 1980).

3. The Court of Appeals was entirely correct in reading the state court Master's statement that he did not construe the trial judge's remarks as a threat to refer at most to the judge's intentions. The meaning of the words used by the trial judge is clear; as the Court of Appeals said:

> The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so. Pet. App. A, pp. 5-6.

By reading the Master to say that no threat was intended, the Court of Appeals reconciled the Master's statement with the inescapable meaning of the words the Master himself had found were used by the trial judge. The only other way to do this would be to read the Master as saying that the trial judge's comments, however intended, were proper and therefore no threat. Had it given the Master's comments this reading, the Court of Appeals would have been obliged to disregard them entirely: whether the trial judge acted properly is not a question of fact, and the federal courts owe no deference to what the state court Master concluded about it when they pass on a constitutional issue. Cuyler v. Sullivan, 446 U. S. 335, 341-42 (1980); Brewer v.

Williams, 430 U.S. 387, 397 n. 4, 403-04 (1977). Indeed, the Master's perspective was limited: he did not even read the trial transcript, but passed only on the trial judge's remarks. Pet. App. C, p.3. If anything, the Court of Appeals was thus unduly generous to the Master's observation.

Conclusion

If a judge is free to initiate plea bargaining during a trial, urge a defendant to plead guilty, announce that failure to do so will lead to a substantial sentence, and then condemn him to literally decades in prison, the federal constitutional right to be tried before being sentenced will be of little avail. In this case, the Court of Appeals in no way intimated (as the Petition says) that a judge may have no involvement with plea bargaining or that what a defendant happens to fear is the measure of what due process demands. What it did conclude is that, on the unusual and egregious facts presented here, a reasonable inference of punishment for the exercise of constitutional rights could be drawn. That conclusion was clearly correct. But even were there room for debate as to how accepted principles of constitutional law should be applied to the particular facts of this case, that would not amount to an issue of general importance which this Court should hear. Respondent Longval therefore urges that certiorari be denied, and that--after he has been in prison for six years under a sentence now held constitutionally tainted--he have the chance to be resentenced on the basis of what he had did outside the courtroom, and not because he has claimed a trial.

Respectfully submitted,

John Leubsdorf
Professor of Law
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617)-353-4420
Counsel for Respondent Longval

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

APPEALS COURT
NO. 80-1158

COMMONWEALTH

V.

NORMAN LONGVAL

APPEALS COURT

Filed April 7, 1981

John E. Powers, Clerk

JOINT MOTION TO STAY THE APPEAL

Now come the Defendant and the Commonwealth and move that this Honorable Court stay the appellate proceedings in the above-entitled case and appoint a master (or if this is not possible remand the case to the Superior Court) to conduct an evidentiary hearing, as described in the attached stipulation. As reasons therefor, both parties state that it is their belief that it is necessary for an evidentiary hearing to be held in order to establish a full record for this Honorable Court's consideration of the defendant's appeal. Further reasons and a detailed explanation of the case are delineated in the attached stipulation.

RESPECTFULLY SUBMITTED,

John Leubsdorf

JOHN LEUBSDORF
ATTORNEY for the DEFENDANT

Lila Heideman

LILA HEIDEMAN
ASSISTANT DISTRICT ATTORNEY
for the EASTERN DISTRICT

So much of the motion as seeks a stay of proceedings is denied. So much as seeks other relief is so integrally related to the merits of the appeal that it is referred for disposition to the panel which hears the appeal.

Christopher J. Armstrong, J.A.C.
June 10, 1981

DATED: APRIL 6, 1981

#8

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

APPEALS COURT
NO. 80-1158

COMMONWEALTH

V.

NORMAN LONGVAL

STIPULATION

Now come the Commonwealth, the Appellee in the above-entitled case, and the defendant, the Appellant, and hereby stipulate that:

1. The defendant, Norman Longval, is challenging the sentence he received on November 10, 1975 for two armed robbery convictions, two assault and battery by means of a dangerous weapon convictions, and one unlawful carrying of a dangerous weapon conviction.

2. On October 9, 1979, the defendant, Norman Longval, filed a request to have counsel appointed, a pro se motion for new trial, and a supporting affidavit, in which he averred that the sentencing judge (Donahue, J.) had relied upon his prior convictions when sentencing him (see attached motion for new trial).

3. In his affidavit, the defendant stated that many of his convictions were uncounselled (see accompanying affidavit).

4. On October 22, 1979, the sentencing judge ordered that the defendant's motion for a new trial be denied "without hearing, all issues raised, having been adjudicated by the Supreme Judicial Court" in the defendant's original appeal.* Commonwealth v. Longval, Mass.Adv.Sh. (1979) 1468.

5. The issue on the defendant's prior appeal was whether the disparity between his prison sentence and that of a co-defendant who pled guilty was lawful; the Supreme Judicial Court held that it was lawful,

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* The denial of the defendant's motion is the subject of the instant appeal.

based in part on the defendant's long criminal record which the Commonwealth had raised as a ground for affirmance. Commonwealth v. Longval, Mass.Adv.Sh. (1979) 1468, 1478.

6. The question of whether the defendant's prior convictions were counselled was not raised in the defendant's original appeal. Commonwealth v. Longval, Mass.Adv.Sh. (1979) 1468.

7. After a second motion to have counsel appointed was granted in March of 1980, the defendant rejected two court-appointed attorneys but accepted present counsel.

8. Present counsel, John Leubsdorf, did not file a second motion for a new trial, but pursued the defendant's appeal from the denial of his original motion for new trial and on February 24, 1981, filed a brief in the Appeals Court.

9. On this appeal, the defendant is claiming that the sentencing judge (Donahue, J.) based his sentence upon the defendant's uncounselled prior convictions in violation of Tucker v. United States, 404 U.S. 443 (1972) (see attached, motion for new trial and accompanying affidavit).

10. At the trial, the defense counsel mentioned the defendant's long criminal record, dating back to 1960 and earlier (Tr.II 277-279).

11. The defendant admitted at trial that the prosecution's description of the robbery was substantially accurate; the defendant had led and planned the robbery, had threatened the persons in the pharmacy, fled in a stolen car, and had been released from Walpole about two years prior to the robbery (Tr.II 199, 206, 208, 211).

12. The sentencing judge gave no reasons for his sentence.

13. It is not apparent from the record which, if any, of the defendant's prior convictions or other factors the sentencing judge relied upon in determining the sentence.

14. It is not apparent whether, in fact, any of the defendant's prior convictions were uncounselled.

15. It is the belief of both the defendant and the Commonwealth that an evidentiary hearing is necessary in order to establish a full record for the Appeals Court's considerations of the defendant's claim.

16. It is the belief of both parties that the issues of whether the defendant's prior convictions were uncounselled and what effect, if any, those particular convictions had on the sentencing judge's decision to sentence the defendant to the terms specified are the major issues that need to be explored at a hearing.

17. The Commonwealth and the defendant understand that under the rules such a hearing may be conducted by the sentencing judge or by a special master appointed by this Court. Appeals Court Rule 2:03; Mass.R.Crim.P. 30(a),(c). It is the defendant's intention to file a request that the sentencing judge recuse himself.

18. The defendant and the Commonwealth have filed a joint motion to stay the appeal pending the outcome of the hearing.

19. Since Mr. Leubsdorf is unable to represent the defendant at the hearing due to Mr. Leubsdorf's schedule, the defendant will file a motion, to which the Commonwealth will assent, to have new counsel appointed for the hearing.

RESPECTFULLY SUBMITTED,

JOHN LEUBSDORF
ATTORNEY for the DEFENDANT
BOSTON UNIVERSITY
SCHOOL OF LAW
765 COMMONWEALTH AVENUE
BOSTON, MASSACHUSETTS 02115

LILA HEIDEMAN
ASSISTANT DISTRICT ATTORNEY
for the EASTERN DISTRICT
ONE BROWN STREET COURT
SALEM, MASSACHUSETTS 01970

DATED: APRIL 6, 1981

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No. 81-261

In the Supreme Court of the United States

October Term, 1980

LAWRENCE R. MEACHUM, et al.,

Petitioners

v.

NORMAN L. LONGVAL,

Respondent

Respondent's Motion for Leave to Proceed in Forma Pauperis

Pursuant to Supreme Court Rule 46, Respondent Norman L. Longval moves for leave to proceed in forma pauperis, without prepayment of fees or costs and without printing his brief. In support of this motion, the undersigned represents: that Respondent was allowed to proceed in forma pauperis in the U. S. District Court for the District of Massachusetts and the U. S. Court of Appeals for the First Circuit; that the undersigned was appointed by the Court of Appeals to represent Respondent, and is doing so without fee; and that the Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

John Leubsdorf
Boston University School of Law
765 Commonwealth Avenue
Boston, Mass. 02215
(617-353-4420)
Counsel for Respondent

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE

TO APPEAL IN FORMA PAUPERIS

IN THE SUPREME COURT OF THE UNITED STATES

MEACHUM)
v.)
NORMAN LONGVAL)

Affidavit in Support of Motion to Proceed in Forma Pauperis

I, Norman Longval, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor or to print my brief, I state that because of my poverty I am unable to pay the costs of proceeding in this Court or to give security therefor; that I believe I am entitled to redress; and that I desire to oppose the petition for certiorari in this case and the petitioner's claims there presented, for reasons set forth in my brief in opposition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Norman Longval

Norman Longval

SUBSCRIBED AND SWORN TO
before me this 3
day of August, 1981.

Sandra K. Lindemer

Notary Public